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ARTICLE

THE MYTH OF *ASHBY V. WHITE*

TED SAMPSELL-JONES*

I. INTRODUCTION

Ashby v. White, the eighteenth century voting rights case, is said to have established the principle that for every right, there must be a remedy. That principle, often rendered in portentous Latin—*ubi jus, ibi remedium*—has played an important role in Anglo-American legal rhetoric. Commentators since Blackstone have argued that the *ubi jus* principle is fundamental to the rule of law. *Marbury v. Madison* applied the *ubi jus* principle when laying the foundation of judicial review, and courts since have similarly relied on it in a variety of contexts. Some have even argued that the Due Process Clause mandates adherence to *ubi jus*. As the supposed progenitor, *Ashby v. White* has been hailed as a centrally important case in the development of the Anglo-American conception of remedial justice.

But contrary to common misconception, *Ashby v. White* did not establish the principle that every right must have a remedy. Although the historical record resists any easy characterization of the "holding" of *Ashby*, the ultimate resolution of the case implicitly rejected the *ubi jus* principle. Both English and American courts of the time understood *Ashby* as holding that only *some* deprivations of rights resulted in judicially enforceable remedies. Modern commentators (or at least modern American commentators) have misrepresented the holding of *Ashby* because they have relied on the most incomplete case reports. These incomplete reports give the misimpression that the outcome in *Ashby* rested on a simple adherence to the grand principle that every right necessarily has a remedy. A close reading of other historical sources and more complete reports, however, reveals that *Ashby's* holding is both more complex and more nuanced than modern American commentators have recognized.

The *ubi jus* principle may or may not merit the devotion it has received from American jurists and scholars. I suspect the *ubi jus* principle is tautological and hence meaningless since the contents of rights can always be

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altered to make the principle either true or not true. It functions mostly as a rhetorical device rather than an independent principle of law. Ironically, *Ashby v. White* demonstrated that very phenomenon. Regardless, whatever the inherent merits of the *ubi jus* principle, it cannot be properly traced to *Ashby v. White*.

II. THE SOURCE OF THE *ASHBY* MYTH: HOLT'S SHIFTING RATIONALES

Ashby v. White was a highly politicized case with a complicated procedural history. The historical record of the case, though lengthy, is also murky. This confusing record has caused scholars to misinterpret the ultimate holding of the case. As the analysis below will show in more detail, scholars have relied on a highly truncated case report from Lord Raymond's nominate reports. That truncated report suggests that the House of Lords adopted an earlier version written by Lord Chief Justice Holt. This dissent, at least as reported by Raymond, placed substantial weight on the *ubi jus* principle.

More complete case reports paint a different picture. They suggest that Holt's own opinion shifted and moderated over the course of litigation. By the time he drafted a final judgment for the House of Lords, he had adopted a narrower rationale for the result. This rationale required a finding of malice by the defendants—and thus implicitly repudiated the *ubi jus* principle.

A. *The Case*

The facts and procedural history of *Ashby v. White* have been recounted elsewhere, most notably in Louis Jaffe's magisterial 1963 Harvard Law Review article.[1] Matthew Ashby was a burgess of the town of Aylesbury who sought to vote in the parliamentary election of 1700.[2] When he was prevented from voting by William White, a constable of Aylesbury, he successfully sued for damages and was awarded £5 by a jury.[3] White appealed the verdict, taking a writ of error to the Queen's Bench.[4] The appeal was successful: three judges agreed with White that no suit for damages could be maintained in such circumstances.[5] The three judges in the major-

1. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 14–15 (1963); *see also* SELECT STATUTES CASES AND DOCUMENTS TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY, 1660–1832, at 408 (C. Grant Robertson ed., 9th ed. 1949) [hereinafter SELECT STATUTES].

2. SELECT STATUTES, *supra* note 1, at 408.

3. 1 W.C. COSTIN & J. STEVEN WATSON, THE LAW AND WORKING OF THE CONSTITUTION: DOCUMENTS 1660–1914, at 278 (2d ed. 1961); Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005, 1015 (2001); *see also* SELECT STATUTES, *supra* note 1, at 408.

4. Ashby v. White, (1703) 92 Eng. Rep. 126 (Q.B.) 128; 2 Ld. Raym. 938, 941; SELECT STATUTES, *supra* note 1, at 408.

5. EDWARD SUGDEN, A TREATISE OF THE LAW OF PROPERTY, AS ADMINISTERED BY THE HOUSE OF LORDS 18 (London, Hodges and Smith 1849).

ity wrote separate opinions, each emphasizing somewhat different points.[6] Lord Chief Justice Holt dissented.[7]

The case moved to Parliament, where a lengthy battle ensued over the appellate jurisdiction of the two houses.[8] The House of Commons claimed jurisdiction over the case since it stemmed from an election to their House.[9] It passed a resolution deciding the case in White's favor and fining Ashby for pursuing the case.[10] Subsequently, the House of Lords claimed jurisdiction pursuant to its historical appellate jurisdiction over errors by the Queen's Bench.[11] By a vote of fifty to sixteen, it overruled the decision of the Queen's Bench and reinstated the verdict in Ashby's favor.[12]

As the ultimate decision by the highest tribunal, the ruling of the House of Lords should be considered the final holding of *Ashby v. White*. But determining the precise content of that holding is problematic for several reasons. First and foremost, in the early eighteenth century, there was no official case reporting system, and the various private case reporters contained somewhat incomplete and inconsistent reports of the proceedings in the House of Lords. Second, the debate in the House of Lords apparently focused more on questions of parliamentary jurisdiction than on the substantive legal questions (including the *ubi jus* principle) at issue in Ashby's lawsuit.[13]

Nonetheless, the House of Lords did produce a case report describing the rationale of its ruling.[14] Lord Chief Justice Holt, the dissenter in the Queen's Bench below, apparently wrote the report.[15] Holt's arguments in the House of Lords report, however, differed in some critical respects from the arguments—or at least the *reported* arguments—he made in the Queen's Bench below. It is possible that the report of his Queen's Bench dissent was inaccurate, and it is possible that over the course of litigation, Holt's own views shifted. Whatever the cause, a close examination of the varying reports and judgments shows that the final rationale did not embrace the *ubi jus* principle in any unqualified or unequivocal way.

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6. *Ashby*, 92 Eng. Rep. at 126, 2 Ld. Raym. at 938. Justice Gould held that Ashby suffered no injury and that the defendants' actions were *damnum absque injuria*. *See id.* at 130, 2 Ld. Raym. at 942–43. Justice Powell also held no injury or damage occurred and Ashby could not bring an action on the case until he petitioned Parliament and was unsuccessful. *See id.* at 134, 2 Ld. Raym. at 948–49. Justice Powys held that Ashby had suffered no injury because the statute granting the right to vote did not imply a cause of action, and that even if he had suffered injury it was so minor as not to warrant redress. *See id.* at 131, 2 Ld. Raym. at 943–44.

7. *Id.* at 135, 2 Ld. Raym. at 950; SELECT STATUTES, *supra* note 1, at 408.

8. Ashby v. White, (1703) 1 Eng. Rep. 417 (H.L.) 419 n.1; 1 Brown 62, 64 n.1.

9. SUGDEN, *supra* note 5, at 18; SELECT STATUTES, *supra* note 1, at 408.

10. SUGDEN, *supra* note 5, at 18; SELECT STATUTES, *supra* note 1, at 408; *see also* E. NEVILLE WILLIAMS, THE EIGHTEENTH-CENTURY CONSTITUTION, 1688–1815, at 226 (1960).

11. SUGDEN, *supra* note 5, at 18; WILLIAMS, *supra* note 10, at 226.

12. SUGDEN, *supra* note 5, at 18.

13. *See, e.g.*, *Ashby*, 1 Eng. Rep. at 417, 1 Brown at 62.

14. *Id.*

15. *See infra* note 41 and accompanying text.

B. *Holt's Queen's Bench Dissent, as Reported by Lord Raymond*

At the time of the litigation in *Ashby*, no formal or official case reporting system existed in England.[16] Judges typically issued judgments orally from the bench. Private case reporters selected cases of interest to be included in collections published under their own names—the "nominate reports."[17] It was the reporter, not the judge, who wrote the report, which was an attempt to capture what the judge had said orally.[18] The accuracy of the reports varied.[19] The *Ashby* case was reported by several nominate reporters,[20] including Lord Robert Raymond.[21] Raymond, who eventually became Chief Justice of the King's Bench, was respected as a reporter, but his accuracy was nonetheless occasionally questioned.[22]

According to Raymond's report of *Ashby*, Chief Justice Holt's Queen's Bench dissent was based largely on a simple and straightforward syllogism. As a minor premise, he argued that Ashby had a right to vote.[23] As a major premise, he argued that the common law provides a remedy for every right.[24]

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.[25]

He thus concluded that Ashby was entitled to a remedy at law—that he was entitled to sue for damages.[26]

Lord Raymond thus reported that Holt's Queen's Bench dissent endorsed a robust version of the *ubi jus* principle. Critically, Raymond then went on to suggest that the House of Lords adopted the rationale of Holt's Queen's Bench dissent. Unfortunately, Raymond's report of the parliamentary proceedings is incomplete and distorted.

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16. *See* JOHN P. DAWSON, THE ORACLES OF THE LAW 65–80 (1968).

17. *See* T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 553–54 (1999) (discussing the nominate reporters of the eighteenth century).

18. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 572, 577–78 (1993).

19. For criticism of the inaccuracies of the nominate reports, see W.T.S. DANIEL, THE HISTORY AND ORIGIN OF THE LAW REPORTS 3 (London, William Clowes and Sons 1884).

20. *See* 1 Brown P.C. 6; 1 Salkeld 19; 6 Modern 45.

21. The full title of Lord Raymond's Reports was: "Reports of Cases Argued and Adjudged in the Courts of King's Bench and Common Pleas." It was first published in 1743, after Raymond's death. *See* JOHN WILLIAM WALLACE, THE REPORTERS, CHRONOLOGICALLY ARRANGED: WITH OCCASIONAL REMARKS UPON THEIR RESPECTIVE MERITS 251 (3d ed., Philadelphia, T. & J.W. Johnson 1855).

22. *Id.* at 248–49.

23. Ashby v. White, (1703) 92 Eng. Rep. 126 (Q.B.) 135; 2 Ld. Raym. 938, 950.

24. *Id.* at 137, 2 Ld. Raym. at 953.

25. *Id.*

26. *Id.* at 137, 2 Ld. Raym. at 955.

After describing the outcome in the Queen's Bench, Lord Raymond's report of *Ashby* includes only a cursory report of the subsequent litigation in Parliament. It states: "Friday the 14th of January 1703, this [*sic*] judgment was reversed in the House of Lords, and judgment given for the plaintiff by fifty Lords against sixteen."[27] It then offers a one-paragraph summary of the arguments made by Holt in the House of Lords.

> Upon the arguments of this case Holt Chief Justice said, the plaintiff has a particular right vested in him to vote. Is it not then a wrong and an injury to that right, to refuse to receive his vote? So if a borough has a right of common, and the freemen are hindered from enjoying it by inclosure or the like, every freeman may maintain his action. This action is brought by the plaintiff for the infringement of his franchise. You would have nothing to be a damage, but what is pecuniary, and a damage to property. If a man has *retorna brevium*, although no fees were due to him at common law, yet if the sheriff enters within his liberty, and executes process there, it is an invasion of his franchise, and he may bring his action; and there is the same reason in this case. . . . By my consent if such an action comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his English right, and if this action be not allowed, a man may be for ever deprived of it. It is a great privilege to chuse such persons, as are to bind a man's life and property by the laws they make.[28]

Lord Raymond's case report suggests that the House of Lords simply adopted the position taken by Chief Justice Holt in his Queen's Bench dissent. It also suggests that the House of Lords decided the case in Ashby's favor based on a straightforward application of the principle that every right must have a remedy.

An examination of other sources, however, shows that Lord Raymond's report of *Ashby v. White* is highly misleading.

C. *Holt's Posthumously Published Pamphlet Judgment*

In 1837, over a century after *Ashby* was decided, a report of Holt's judgment in the case was discovered and published in London as a pamphlet titled *The Judgements Delivered by The Lord Chief Justice Holt in the case of Ashby v. White and Others and in the case of John Paty and Others.* According to the introduction, a solicitor named Blake had a folio of various judgments by Holt, including a lengthy report of *Ashby v. White*.[29] The introduction states that the report was written by Holt himself, and that it was more accurate and more complete than Lord Raymond's report of the

27. *Id.* at 138, 2 Ld. Raym. at 958.

28. *Id.*

29. THE JUDGEMENTS DELIVERED BY THE LORD CHIEF JUSTICE HOLT IN THE CASE OF ASHBY V. WHITE AND OTHERS AND IN THE CASE OF JOHN PATY AND OTHERS iii–iv (London, Saunders and Benning 1837) [hereinafter THE JUDGEMENTS].

case. "These writings authenticate themselves, by their form and style, as the Chief Justice's own reports of the two judgments delivered by him. They are in some parts considerably more complete than those given by any of the contemporary reporters, even Lord Raymond, the most accurate of them all."[30]

The opinion published in the pamphlet differs in material respects from the opinion reported by Lord Raymond. It is possible that Lord Raymond's report simply contained errors and omissions. The accuracy of the nominate reports varied. It is also possible that Raymond's report was accurate, but that Holt's own rationale shifted after he initially pronounced his judgment in the Queen's Bench. The introduction to the pamphlet report refers to the judgment contained therein as a "revised statement of [Holt's] own views" that "supplies some deficiencies that were left at the time of the decision in the Queen's Bench."[31] Regardless, whether by initial error or subsequent revision, the pamphlet report written by Holt himself differs significantly from the report written by Lord Raymond.

The pamphlet report relies on the same basic syllogism: first, that Ashby had a right to vote; second, that every right requires a remedy.[32] As to the latter, Holt's expanded report contained another bold statement of the *ubi jus* principle.

> It follows now, in the next place, to show that in consequence of this right, privilege, or franchise, the possessor thereof must have a legal remedy to assert, maintain, and vindicate it.
>
> There is no such notion in the law as a right without a remedy.
>
> If a man once loses or quits his remedy he loses his right.[33]

But the pamphlet report was also different from Lord Raymond's report of the Queen's Bench dissent in two subtle but important respects. First, the pamphlet report relied to a much greater extent on the statutory basis of the right and the cause of action.[34] Holt's revised argument relied on the Statute of Westminster I, which stated that "no great man or other, by force of arms, nor by malice or menaces, shall disturb any to make free election."[35] By contrast, Lord Raymond's report had mentioned the statute only in passing.[36]

Second, Holt's pamphlet report placed more emphasis on the malicious and fraudulent nature of the defendants' conduct.

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30. *Id.* at iv.
31. *Id.* at iv, vii.
32. *Id.* at 9.
33. *Id.* at 9–10.
34. *Id.* at 11–12.
35. *Id.* at 12.
36. *Ashby*, 92 Eng. Rep. at 138, 2 Ld. Raym. at 954.

> Indeed I do not find that the defendants did by force of arms drive the plaintiff away from the election, nor by menaces deter him, but I find they did maliciously hinder him; and so it is charged by the plaintiff in the declaration, and so found by the jury, that they did it by fraud and malice, and so the defendants are offenders within the very words of the Statute of Westminster I.[37]

Responding to arguments that at least some deprivations produce no cause of action, Holt further contended, "No action will lie for not giving a right, but surely it is law that an action will lie for defrauding and hindering a man to enjoy the right which he hath."[38] Holt then refuted the argument that allowing suits in such cases would cause many inconveniences, stating, "It will be a great security to the subject's right and property against the frauds and partialities of officers that are trusted in great measure with the rights of the people, to receive and allow their suffrages upon elections."[39]

While the expanded pamphlet report of Holt's judgment maintains some basic fealty to the *ubi jus* principle, it also reveals adherence to a more moderate and nuanced position. It was not simply the denial of a right to vote that entitled Ashby to a remedy; rather, it was a *fraudulent* denial of the right to vote that entitled him to a remedy.

D. The Report of the House of Lords

Both Lord Raymond's report of Holt's dissent and the pamphlet report purport to represent Holt's own view of the case. While Holt's individual views on the case were certainly important and influential, it was ultimately the House of Lords that decided the case. The House appointed a committee to prepare a report on the state of the case.[40] That committee report was then approved by the House, along with an accompanying resolution. The committee report was then published in a variety of parliamentary histories over the next century.[41]

Holt has long been credited as the author of the Lords committee report, though the report does not explicitly name him as such.[42] Still, his influence is plain enough: in structure and in content, the committee report is similar to Holt's individual judgment, as reported both by Lord Raymond and Holt's own pamphlet report.[43] The committee report relied on Holt's

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37. THE JUDGEMENTS, *supra* note 29, at 12.

38. *Id.* at 30.

39. *Id.* at 33.

40. 6 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 302–03 (London, R. Bagshaw 1810), *available at* http://hdl.handle.net/2027/nnc1.0315059588.

41. *See, e.g., id.*; 4 A COLLECTION OF THE PARLIAMENTARY DEBATES IN ENGLAND (John Torbuck ed., reprt. London, 1741) (Dublin, n.d.), *available at* http://hdl.handle.net/2027/nyp.33433082032222; 2 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF LORDS (London, Ebenezer Timberland 1742), *available at* http://hdl.handle.net/2027/mdp.39015068045932.

42. *See, e.g.*, 6 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 40, at 303.

43. *See id.*

basic syllogism, and it endorsed the idea that "there is no such notion in the law of England, as a right without a remedy."[44] But the committee report also differs from Holt's earlier judgments in some critical respects. The committee report spends more time responding to the concern that suits would burden local officers. As part of that response, it emphasizes the importance of pleading and proving fraud and malice.

> [N]or is there any danger to an honest officer, that means to do his duty; for where there is a real doubt touching the parties [*sic*] right of voting, and the officer makes use of the best means to be informed; and it is plain his mistake arose from the difficulty of the case, and not from any malicious or partial design, no jury will find an officer guilty in such a case, nor can any court direct them to do it; *for it is the fraud and the malice that entitles the party to the action*: In this case, the defendants knew the plaintiff to be a burgess, and yet fraudulently and maliciously hindered him from his right of voting; and justice must require, that such an obstinate and unjust ministerial officer should not escape with indemnity.[45]

Whereas Lord Raymond's report of Holt's Queen's Bench dissent had barely mentioned malice, and Holt's own pamphlet report relied only to some extent on the allegation and proof of malice, the committee report contains a firm conclusion that malice was essential to the action.[46] It suggests that without proof of malice, the action could not succeed, and that the right to vote could not be vindicated by any judicial remedy.

The full House of Lords approved the committee report by a fifty to sixteen vote. It also approved an accompanying resolution, which read:

> It is resolved by the Lords spiritual and temporal in parliament assembled, that by the known laws of the kingdom, every freeholder, or other person, having a right to give his vote at the election of members to serve in parliament, and being *willfully* denied or hindered so to do by the officer who ought to receive the same, may maintain an action in the Queen's courts against such officer, to assert his right, and recover damages for injury.[47]

Like the report, the House of Lords resolution emphasized the necessity of some willfully wrongful act—it emphasized the necessity of malice.

The House of Lords committee report and resolution are more nuanced, more complicated, and arguably more ambiguous than Holt's own individual judgments. While expressing some passing fealty to the *ubi jus* principle, the report and resolution suggest that proof of malice and willful-

44. *Id.* at 308.

45. *Id.* at 313 (emphasis added).

46. *Id.*

47. *Id.* at 323 (emphasis added).

ness were necessary elements of the action.[48] In so holding, they also suggest that accidental or good faith denials of a right to vote would not result in a legally enforceable remedy. Thus, not every deprivation of the right to vote would have a remedy. The final ruling in the House of Lords undermined the very *ubi jus* principle that the case is purported to uphold.

It is unclear from the historical record why the final House of Lords report and resolution differed from both Lord Raymond's report of Holt's initial dissent and Holt's own pamphlet report of his individual views. It may be that Holt's own views on the matter changed over the several years of litigation. Or perhaps he was forced to adopt a more moderate rationale in order to win the assent of his fellow Lords. In any event, it cannot be said that the ultimate resolution of *Ashby v. White* in the House of Lords rested on the simple and straightforward notion that for every right, there must be a remedy. The House of Lords did not simply adopt Holt's Queen's Bench dissent, and it certainly did not adopt Lord Raymond's subsequently published report of that dissent.

Unfortunately, Lord Raymond's widely cited report, which was eventually reprinted in the English Reports, suggests that the House of Lords simply adopted the *ubi jus* principle. Even if Lord Raymond's report of Holt's initial Queen's Bench dissent was accurate—which is questionable—the report misleadingly suggests that the House of Lords simply adopted Holt's dissent. Lord Raymond's report does not quote or mention the final report and resolution of the House of Lords.

More complete accounts of the proceedings in the House of Lords were reported elsewhere. The committee report and resolution were reproduced in at least two eighteenth century parliamentary histories, including *A Collection of the Parliamentary Debates in England*, published in 1741, and *The History and Proceedings of the House of Lords*, published in 1742.[49] In 1810, the House of Lords report and resolution were also published in *Cobbett's Parliamentary History*.[50] They were subsequently reprinted in Howell (and Cobbett's) *State Trials* in 1816, and again in later editions of *Smith's Leading Cases*.[51] These sources present a more complete and more accurate account of the case.

Many courts and commentators, however, have relied solely on Lord Raymond's report of *Ashby v. White*. Consequently, many courts and commentators have been led to believe that Holt's Queen's Bench dissent, and

48. *See supra* note 41 and accompanying text.

49. *Id.*

50. *See* 6 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 40.

51. T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 695–888 (London, R. Bagshaw, 1816); 1 THOMAS WILLES CHITTY ET. AL., A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW 231–86 (London, Sweet and Maxwell, 10th ed. 1896); 1 THOMAS WILLES CHITTY ET. AL., A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW 240–98 (11th ed. 1903); 1 THOMAS WILLES CHITTY ET. AL., A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW 266–334 (12th ed. 1915).

its straightforward adoption of the *ubi jus* principle, ultimately carried the day. As a result, the final resolution and the true meaning of the case have often been obscured.

III. INTERPRETATIONS, AND MISINTERPRETATIONS, OF *ASHBY V. WHITE*

A. *Early English Cases Interpreting* Ashby

The final *Ashby* holding was arguably ambiguous. While the Lords' ultimate resolution of the case rested on a requisite showing of malice, it also mentioned the *ubi jus* principle. Any ambiguity on the matter was resolved, however, by subsequent English cases that clearly affirmed the malice requirement in suits against public officers.

Like *Ashby*, the 1787 case of *Drewe v. Coulton* revolved around the denial of a right to vote in a parliamentary election.[52] The court returned a nonsuit on grounds that there was no showing of malice, stated that *Ashby* rested on a showing of malice, and expressly recognized that the House of Lords had not accepted the original rationale proposed by Holt in his Queen's Bench dissent.[53]

> This is in the nature of it an action for misbehaviour by a public officer in his duty. Now I think that it cannot be called a misbehaviour unless maliciously and wilfully done, and that the action will not lie for a mistake in law. The case of *The Bridgmaster* is in point. In all the cases put the misbehaviour must be wilful, and by wilful I understand, contrary to a man's own conviction. Therefore I think from the opening of the counsel this is not a wilful refusal of the vote. In *Ashby and White* I do not see any thing in Lord Holt's opinion, as to its being wilful being a necessary ingredient in the action: but afterwards in entering the resolution of the Lords I find that they relied on that ground.[54]

The court in *Drewe* relied in part on the previously unreported 1768 case of *Burgoyne v. Moss*, another voting case where the defendant had obtained a verdict due to the lack of evidence of malice.[55] Lord Chief Justice Kenyon adopted a similar requirement in 1797 in *Williams v. Lewis*.[56] Citing *Ashby* and subsequent cases, he stated that a "mere error in judgment" was insufficient for a remedy—to succeed in a suit, a plaintiff had to show a "deliberate act to serve a particular purpose."[57]

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52. *Drewe v. Coulton* was first reported as a note to the 1801 case of *Harman v. Tappenden*. Harman v. Tappenden, (1801) 102 Eng. Rep. 214 (K.B.) 217–18 n.(a)[2]; 1 East 555, 563.

53. *Id.* at 219 n.(a)[2], 1 East at 566.

54. *Id.* at 217–18 n.(a)[2], 1 East at 563.

55. *Id.* at 217, 1 East at 563.

56. Williams v. Lewis, (1797) 170 Eng. Rep. 229 (K.B.) 232–33; Peake Add. Cas. 157, 164–65.

57. *Id.* at 230, Peake Add. Cas. at 159.

Shortly after the turn of the nineteenth century, in *Harman v. Tappenden* the King's Bench again rejected a suit against a public officer for lack of malice.[58] It cited *Drewe v. Coulton* for the correct interpretation of *Ashby* and its malice requirement.

> [T]hough Lord Holt in the case of *Ashby v. White* endeavored to shew that the action lay for the obstruction of the right, yet that the House of Lords, in the justification of their conduct, supposed to be written by the Chief Justice, put it upon a different principle, the wilfulness of the act.[59]

Similarly, in *Cullen v. Morris*, a voting case was submitted to the jury, but the jury was instructed that it could not find for the plaintiffs without a finding of malice.

> The question for your consideration is, whether the refusal of the vote in this instance, was founded on an improper motive on the part of the defendant, it is for you to pronounce your opinion, whether the defendant's conduct proceeded from an improper motive, or from an honest intention to discharge his duty acting under professional advice. If he intended to do prejudice either to the plaintiff or to the candidate for whom he meant to vote, the plaintiff is entitled to your verdict; if on the other hand he acted in the best way he could according to his judgment, your verdict ought to be for the defendant.[60]

Despite this clear line of authority, questions about the proper interpretation of *Ashby* continued to arise through the middle of the nineteenth century. In *Tozer v. Child*, yet another voting rights case, the trial court instructed the jury that malice was a necessary element of the plaintiff's action.[61] After the jury returned a verdict for the defendants, the plaintiff brought a bill of exception to the Court of Exchequer Chamber and argued that the trial court's instruction misstated the law. In his arguments to the Exchequer, plaintiff's counsel cited Holt's Queen's Bench dissent in *Ashby* and argued that under that authority, no showing of malice was required.[62] Defense counsel countered that a "fuller report than that in Lord Raymond of Lord Holt's judgment has been published from a manuscript," referring to the then-recently published intermediate judgment written by Holt.[63] Defense counsel noted that in the revised judgment, Holt had suggested a malice requirement. Plaintiff's counsel responded that there was a question about which report was entitled to "greater authority," and suggested that "the reports of Lord Raymond . . . are always considered as of very high

58. *Harman*, 102 Eng. Rep. at 214, 1 East at 555.

59. *Id.* at 219, 1 East at 566–67.

60. Cullen v. Morris, (1819) 171 Eng. Rep. 741 (K.B.) 745; 2 Stark. 577, 589.

61. *See* Tozer v. Child, (1857) 119 Eng. Rep. 1286 (Exch. Chamber) 1288; 7 El. & Bl. 375, 380 (appeal taken from Q.B.).

62. *Id.* (arguments of Serjt. Shee, citing the Lord Raymond's report of *Ashby v. White*).

63. *Id.* at 1288, 7 El. & Bl. at 381.

authority."[64] For reasons unclear, neither counsel cited to the ultimate judgment of the House of Lords.

After hearing these arguments, the Exchequer court affirmed the malice requirement. It suggested that Holt's intermediate judgment overrode the earlier judgment published in Lord Raymond's.[65] The court also cited *Drewe v. Coulton* and *Cullen v. Morris* as firmly supporting a malice requirement in such cases.[66] In short, it rejected the plaintiff's claim that Holt's Queen's Bench dissent was an accurate statement of the law.

Ultimately, while disputes about the proper interpretation of *Ashby* arose in English courts for well over a century after the case was decided, those disputes were uniformly resolved in favor of a malice requirement. *Ashby* was not cited for the broad proposition that every right must have a remedy. Rather, it was cited for the narrower proposition that while public officers could be sued for damages, plaintiffs were required to allege and prove malice. More specifically, several cases explicitly recognized that the House of Lords rejected the broad *ubi jus* rationale adopted by Holt at the early stages of appeal.

B. *Early American Cases Interpreting* Ashby

Early American cases similarly accepted that the doctrine of *Ashby* and its progeny required a showing of malice for suits against public officers. The leading American case was *Jenkins v. Waldron*.[67] During the general election of 1811 in the city of Hudson, New York, the defendants refused to allow Waldron, a freed black man, to vote, supposedly on the grounds that Waldron's certificate attesting to his freed status was not signed by a duly authorized judge. Waldron won a jury verdict, but the defendants appealed, arguing in part that there was no proof of malice.

The defendants were represented by Martin Van Buren on appeal. Citing *Harman v. Tappenden* and *Drewe v. Coulton*, Van Buren argued that an "action does not lie for mere error of judgment."[68] In response, Waldron's counsel relied on *Ashby* to argue that Holt's decision required no showing of malice.[69] Relying on the second edition of Brown's Parliamentary Cases, he also argued that the House of Lord's decision did "not speak of malice being necessary."[70] Van Buren pounced, pointing out that plaintiff's counsel had misrepresented the true holding of *Ashby*.

> It is true, that in the case of Ashby v. White the Court of K. B., Holt, Ch. J., dissenting, have decided that the action would not

64. *Id.*
65. *Id.* at 1288, 7 El. & Bl. at 382.
66. *Id.*
67. Jenkins v. Waldron, 11 Johns. 114 (N.Y. 1812).
68. *Id.* at 114–20 (Mr. Van Buren for plaintiffs in error).
69. *Id.* at 114–20 (Mr. Jas. Strong, contra).
70. *Id.*

> lie, that judgment was afterwards reversed in the House of Lords. But on what ground? Precisely on the ground of malice, or a willful and corrupt denial, on the part of the defendant of the vote of the plaintiff. This appears from one of the resolutions of the House of Lords, in answer to the resolutions of the House of Commons, as printed, in a note, in the first edition of Brown's Parliamentary Cases, 49. By some mistake, that part of the note containing the resolutions of the Lords is not printed in the second edition, edited by Mr. Tomlins. Justice Wilson, therefore, in the case of Drewy v. Coulton [*sic*], was correct in saying that the House of Lords put the justification of their decision on the ground of the willful or malicious conduct of the officer.[71]

The New York Supreme Court, in an opinion authored by Ambrose Spencer, agreed with Van Buren. Curiously, it suggested that the reasons for the Lords' ruling in *Ashby* "do not appear in the report of the case,"[72] but nonetheless agreed, based on the resolution, that *Ashby* supported a malice requirement. It went on to cite *Harman* and *Drewe*, which "clearly show that this action is not maintainable, without stating and proving malice express or implied on the part of the officers."[73]

Most other state courts in the early to mid-nineteenth century agreed with the New York Supreme Court. In *Swift v. Chamberlain*, the Connecticut Supreme Court reversed a jury verdict against an officer because the jury had not been required to find malice.[74] It cited *Ashby*, *Drewe*, and *Jenkins* in support of the malice requirement. In 1824, the Supreme Court of Pennsylvania similarly concluded that officers were not liable for good faith mistakes. It discussed the proper interpretation of *Ashby*.

> [T]hat [an officer] is responsible, if he acts wilfully and maliciously, was decided by the *English* House of Lords in the case of *Ashby v. White*, 1 *Bro. Parl. Cas.* 49, and has been held for law ever since. Lord HOLT, indeed, in his argument on that case, in the Court of King's Bench, 2 Ld. Raym. 938, takes no notice of malice, and seems to have been of opinion, that the officer who refused a good vote, at an election of members to come into parliament, was at all events liable to an action. But in that he was wrong, though he was right in his opinion, that the plaintiff was entitled to judgment, because the declaration alleged malice. The judgment was arrested in the Court of King's Bench, by the opinion of three justices, against HOLT. But in the House of Lords, the plaintiff obtained his judgment, and in the resolution of the Lords, (supposed to have been drawn up by Lord HOLT,) the decision is placed on the ground of malice.[75]

71. *Id.* at 114–20 (Mr. Van Buren, in reply).
72. *Id.* at 120.
73. *Jenkins*, 11 Johns. at 120–21.
74. Swift v. Chamberlain, 3 Conn. 537, 543–44 (1821).
75. Weckerly v. Geyer, 11 Serg. & Rawle 35, 39–40 (Pa. 1824).

It cited *Harman*, *Drewe*, *Jenkins*, and *Swift* in support of its interpretation of *Ashby*. Other state courts reached the same result,[76] as did the United States Supreme Court.[77]

Massachusetts was the sole outlier among early nineteenth century jurisdictions that interpreted *Ashby*. In *Lincoln v. Hapgood*, the Massachusetts Supreme Court rejected a malice requirement in a voting rights case, and relied instead on a full-throated statement of the *ubi jus* principle.[78] Relying on Holt's dissent and citing only Lord Raymond's report of *Ashby*, it held that *Ashby* supported no malice requirement.

> [I]n the case of *Ashby vs. White*, the principle upon which this action is to be maintained was fully recognized by Lord *Holt*, and afterwards by the House of Lords, who reversed the judgment given by the three other judges of the King's Bench, against the opinion of that eminent judge. The argument upon which that case turned was, that an actual injury had been done, and that it was inconsistent with the character of the *English* laws that there should be no remedy for a subsisting injury. No question seems to have been made in that cause of malice in the returning officer; probably none was suggested.[79]

The Massachusetts Supreme Court's view of *Ashby* was simply mistaken. Malice was pled and proved in *Ashby*, and though it played no role in Holt's initial dissent, it proved critical in the Lord's report and resolution. The Massachusetts Court was led astray when it relied on an incomplete case report. Its mistake would soon be widely replicated.

C. *Recasting* Ashby *as the Source of the* Ubi Jus *Principle*

The *ubi jus* principle was recognized in American law long before the middle and late nineteenth century. It was discussed at some length in Blackstone's authoritative Commentaries,[80] and it was central to the Supreme Court's 1803 opinion in *Marbury v. Madison*.[81] But it was not until the middle and late nineteenth century that American courts and scholars began to cite *Ashby v. White* as the historical source of the *ubi jus* princi-

76. McCormick v. Burt, 95 Ill. 263, 267 (1880); Carter v. Harrison, 5 Blackf. 138, 139 (Ind. 1839); Donahoe v. Richards, 38 Me. 379, 394 (1854); Reed v. Conway, 20 Mo. 22, 43–44 (1854); Wheeler v. Patterson, 1 N.H. 88, 89 (1817); Rail v. Potts, 27 Tenn. 225, 229–30 (1847).

77. Wilkes v. Dinsman, 48 U.S. 89, 130–31 (1849) (citing Harman v. Tappenden, 102 Eng. Rep. at 217, 219; 1 East at 562, 567) ("In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful error.").

78. Lincoln v. Hapgood, 11 Mass. 350 (1814).

79. *Id.* at 356 (citation omitted).

80. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 109 (Oxford, 1768).

81. Marbury v. Madison, 5 U.S. 137, 163 (1803).

ple.[82] The re-interpretation of *Ashby*, while misleading and essentially apocryphal, has had remarkable staying power.

In 1838, sitting circuit justice Joseph Story praised Holt's opinion in *Ashby v. White* as the source of the great *ubi jus* principle.[83] Remarkably, Story had obtained the pamphlet with Holt's pamphlet report, which had been published in London only a year earlier.[84] Story did not notice the shift in the judgment toward a malice-based rationale. Rather, he argued that the pamphlet report demonstrated an even stronger defense of the *ubi jus* principle.[85] Story also stated that Holt's judgment had been "supported by the house of lords, and that of his brethren [on the Queen's Bench] overturned."[86] Story did not mention that the Lords had decided the case on somewhat different grounds; indeed, he neither cited nor mentioned the House of Lords report or resolution. Though Story likely had better access to sources than any other lawyer or judge of his time, he may have remained ignorant of the parliamentary proceedings and of the ultimate ruling in the case.

Similar citations to *Ashby*—and specifically to Lord Raymond's report of Holt's Queen's Bench dissent—soon became common. In 1855, the Supreme Court of North Carolina cited *Ashby* in support of the *ubi jus* principle.[87] It cited Salkeld's reports which, like Lord Raymond's report, contained no description of the proceedings at the House of Lords.[88] In 1856, the Supreme Court of Massachusetts similarly cited *Ashby* in support of the *ubi jus* principle, citing to both Salkeld's and Raymond's reports.[89] In 1892, Justice William Mitchell of the Minnesota Supreme Court extensively cited Holt's Queen's Bench dissent (as reported by Raymond) in support of the *ubi jus* principle, which Mitchell declared was "as old as the law itself."[90]

American courts in the twentieth century continued to repeat the claim that *Ashby* either established or at least supported the *ubi jus* principle.[91]

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82. Riley v. Carter, 25 A. 667, 669 (Md. 1893); Stratton v. European & N. Am. Ry., 74 Me. 422 (1883); Cross v. Grant, 62 N.H. 675 (1883); Johnson v. Girdwood, 28 N.Y.S. 151, 152 (Com. Pl. Ct. 1894); Moulton v. Beecher, 1 Abb. N. Cas. 193 (N.Y. Gen. Term 1876); Gulick v. Gulick, 21 How. Pr. 22 (N.Y. Gen. Term 1860).

83. Webb v. Portland Mfg. Co., 29 F. Cas. 506, 508 (C.C.D. Me. 1838).

84. *See id.* at 508 n.2 (citing THE JUDGEMENTS, *supra* note 29).

85. *See id.* at 508–09.

86. *Id.* at 508.

87. Bond v. Hilton, 47 N.C. 149, 150–51 (1855).

88. *See* 1 WILLIAM SALKELD, REPORTS OF CASES ADJUDGED IN THE KING'S BENCH 19–20 (London, E. and R. Brooke, & J. Butterworth, 6th ed. 1795).

89. Hastings v. Livermore, 73 Mass. 194, 197 (1856).

90. Willis v. St. Paul Sanitation Co., 50 N.W. 1110, 1112 (Minn. 1892); *see also* Hale v. Hardon, 95 F. 747, 767 (1st Cir. 1899) (citing Lord Raymond's report).

91. Collins v. O'Laverty, 68 P. 327, 328 (Cal. 1902) (citing Lord Raymond's report); Willoughby v. Trevisonno, 97 A.2d 307, 310 (Md. 1953) (citing Lord Raymond's report); Gottlieb v. Am. Auto. Ins. Co., 7 A.2d 609, 610 (Md. 1939) (citing Lord Raymond's report); Hillenbrand v. Bldg. Trades Council, 14 Ohio Dec. 628 (Super. Ct. Cincinnati 1904); Willcox v. Penn Mut. Life

Typically, those courts cited only to Lord Raymond's report of Holt's Queen's Bench dissent. Today, courts continue to repeat misleading claims about *Ashby* despite the ease of Internet access to full case reports. In a 2008 dissent, for example, Justice Hecht of the Texas Supreme Court cited *Ashby* as the source of the *ubi jus* principle, stating: "On writ of error from the King's Bench, the House of Lords reversed the judgment and ruled in favor of the plaintiff for the reasoning stated in Lord Chief Justice Holt's dissent."[92]

Notably, modern British courts have not made the same claims. They have consistently recognized the difference in rationale between Holt's original dissent and his ultimate House of Lords report and have avoided broad claims that *Ashby* established a categorical *ubi jus* principle.[93] American scholars, however, have been less precise.

Like American courts, some American scholars in the middle and late nineteenth century began to cite *Ashby* as a leading source in support of the *ubi jus* principle.[94] More recent scholars have done the same.[95] Like Ameri-

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Ins. Co., 55 A.2d 521, 530–31 (Pa. 1947) (citing Lord Raymond's report); Miers v. Brouse, 271 S.W.2d 419, 421 (Tex. 1954) (citing Holt's Queen's Bench dissent); W.R. Grace & Co.-Conn. v. State Dep't of Revenue, 973 P.2d 1011, 1030 n.17 (Wash. 1999) (citing Lord Raymond's report and the English Reports).

92. Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc., 246 S.W.3d 42, 62 n.22 (Tex. 2008) (Hecht, J., dissenting).

93. *See, e.g.*, Three Rivers Dist. Council v. Bank of Eng., (1996) 3 All E.R. 558 (Q.B.) at 586; Bourgoin S.A. v. Ministry of Agric., Fisheries & Food, [1986] Q.B. 716 at 734–40.

94. *See* Herbert Broom, *Law Maxims*, 2 LAW MAG. QUART. REV. JURIS. 112, 123 (1845) (citing *Ashby* as the source of the *ubi jus* maxim); The Central Law Journal, *St. Louis, December 18, 1891*, 33 CENT. L.J. 461, 463 (1891) (citing *Ashby*, as reported by Salkeld, for the "familiar maxim of the law that for every wrong there is a remedy"); Wm. L. Hodge, *Wrongful Interference by Third Parties with the Rights of Employers and Employed*, 28 AM. L. REV. 47, 56 (1894) (citing to Lord Raymond's report); George H. Smith, *Of Actions Old and New*, 39 AM. L. REV. 223, 226 (1905) (citing to Lord Raymond's report and discussing Holt's dissent and the House of Lords decision); Joseph H. Vance, *Mechanics' Lien on Personal Property*, 30 AM. L. REG. 209, 211 (1882) (citing *Ashby* for the proposition that an action can be sustained whenever there is a wrong done by the defendant); G. P. Voorhies, *The Remedies of an Executor and of a Creditor Against an Estate for Necessaries Furnished after the Death of the Testator*, 34 CENT. L.J. 405, 408 (1892) (citing to Smith's Leading Cases). *But see* The Law Magazine and Law Review, *Two Lectures Introductory to the Study of the Law*, 4 LAW MAG. & L. REV. QUART. J. JURIS. 3d ser. 201, 223 (1857–1858) (recognizing that *Tozer v. Child* clarified the proposition left "somewhat doubtful" by Lord Raymond's report of *Ashby*—that malice is essential). Even English commentators during this time period got it wrong. Thomas Erskine May, *A Practical Treatise on the Law, Privileges, Proceedings, and Usages of Parliament*, 7 LAW MAG. & L. REV. QUART. J. JURIS. 3d ser. 1, 9 (1859) (citing *Ashby* as the celebrated case which exemplified the *ubi jus* maxim).

95. *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 282 n. 31 (2008); Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1637 (2004); *see also* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 839 (2003–2004); Frances Bennion, *Codifying the Tort of Breach of Statutory Duty*, 17 STATUTE L. REV. 192, 193 (1996); Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 532 n.42 (2004); H. Miles Foy III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 528 (1985–1986); Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS

can courts, American scholars have typically cited only to Lord Raymond's incomplete report when making such claims. Like American courts, American scholars have typically failed to recognize that *Ashby v. White* rested on a requirement of malice, not on a categorical endorsement of the principle that every right must have a remedy.

To be fair, there is nothing inherently wrong with citing Holt's Queen's Bench dissent as support for the *ubi jus* principle. After all, Holt was the leading jurist of his day, so his views have some weight of authority. Additionally, his Queen's Bench dissent, at least as reported by Lord Raymond, did rest heavily on the *ubi jus* principle. Nonetheless, such citations are misleading in several ways.

First, based on other available sources, and in light of well-known problems with nominate reports, it is at least questionable whether Lord Raymond's report of Holt's dissent was complete and accurate. Second, even if Lord Raymond's report was complete and accurate, it is misleading to cite Holt's Queen's Bench dissent without noting that Holt himself subsequently altered and moderated his view of the case in subsequent judgments. Third, it is false to suggest that the House of Lords adopted Holt's Queen's Bench dissent when in fact it adopted a substantially revised rationale. Fourth, it is false to suggest that *Ashby* "established" the *ubi jus* principle in the common law when subsequent cases interpreting *Ashby* made clear that malice was essential in suits against public officers and thus, that not every violation of a right produced a remedy.

IV. THE EMPTINESS OF THE *UBI JUS* PRINCIPLE

Contrary to popular legend, *Ashby v. White* did not establish the principle that for every right, there must be a remedy. As a purely historical matter, *Ashby* should not be cited as the source of the *ubi jus* principle. To be sure, the *ubi jus* principle has other weighty authority on its side, from Blackstone to *Marbury*. Defenders of the principle might argue that even if *ubi jus* is not firmly supported by *Ashby*, its historical pedigree is nonetheless solid. Its defenders might also argue that history aside, the *ubi jus* principle is supported by reason, logic, and fundamental ideals of justice. But a close examination of *Ashby* reveals not only that the historical support for the *ubi jus* principle is weaker than commonly imagined. It also reveals that the power of the principle itself may be illusory.

The final judgment by the House of Lords adopted an ambiguous and possibly contradictory position. On one hand, it remarked at least in passing that every right should have a remedy. On the other hand, it stated that

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L.J. 1005, 1015 (2000–2001); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 90 n.154 (1989); Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 671–72 (1986–1987).

malice was essential to the action—and thus that a good faith violation of the right would not have a remedy. First, it stated that every right should have a remedy, but then it concluded that not every violation should have a remedy. At least at first blush, those two propositions appear irreconcilable, and *Ashby* therefore appears internally contradictory.

The apparent contradiction can be dissolved, however, with a rhetorical trick. By re-characterizing the right, we can reconcile the apparently irreconcilable rationales of *Ashby*. Consider two different formulations of the relevant underlying right:

(a) Ashby had a right to vote.
(b) Ashby had a right not to have his vote maliciously denied.

In describing the ultimate holding of *Ashby*, we could say that it assumed formulation (a) and that it partially rejected the *ubi jus* principle by holding that courts will only provide a remedy when the right is maliciously violated. Under formulation (a), the House of Lords report appears contradictory—or at a minimum, it appears that the *ubi jus* principle is not categorical and is subject to some exceptions. But in the alternative, we could say that the House of Lords report assumed formulation (b), and thus affirmed the *ubi jus* principle while at the same time affirming a malice requirement based on the applicable statute. Under formulation (b), the apparent contradiction disappears. By re-drawing the boundaries of the right to match the scope of permitted remedies, we can always maintain adherence to the *ubi jus* principle.

At least as a theoretical matter, we can play the same trick in any circumstance where there appears to be a gap between rights and remedies. Consider the harmless error rule. A criminal defendant has the right to confront witnesses against him, for example, but he is not entitled to a remedy for a violation of that right if the error was harmless. The harmless error principle, by denying a remedy in certain cases where a right was violated, appears to violate the *ubi jus* principle. But once again, we can dissolve that problem by re-characterizing the right. Consider two different formulations of the underlying right:

(a) The defendant has the right to confront witnesses against him.
(b) The defendant has the right to confront witnesses who offer important testimony against him.

In light of the harmless error rule, we can maintain adherence to the *ubi jus* principle by choosing formulation (b) rather than formulation (a).

It is for that reason that many legal scholars since Holmes abandoned the right/remedy distinction itself. As he famously put it, "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."[96]

96. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

Legal realists such as Karl Llewellyn subsequently made the same point: "[A] right is best measured by effects in life. Absence of remedy is absence of right."[97] Adopting a realist or functional approach to rights renders the *ubi jus* principle true simply as a definitional matter. If the scope of the right itself is defined by the scope of the available remedies, then it is true but also utterly trivial to say that for every right, there must be a remedy. In short, the very notion that the *ubi jus* principle is meaningful and important depends on an acceptance of a particular notion of the law—what Daryl Levinson called "rights essentialism."[98]

Following scholars from Holmes to Levinson, we can reject rights essentialism. Doing so renders the *ubi jus* principle tautological. In the alternative, we can follow other modern scholars, like John Jeffries, who maintain some version of rights essentialism but accept that *ubi jus* is only a general principle and not an ironclad command.[99] Either formulation is possible, and either can produce the same results in any given case. Under either formulation, the *ubi jus* principle has little independent legal significance. At best, it is defeasible; at worst, it is meaningless.

V. CONCLUSION

Modern American scholars and judges have misinterpreted *Ashby v. White* because they have relied solely on Lord Raymond's incomplete and possibly inaccurate report of the case. Other sources, including the final report and resolution of the House of Lords, demonstrate that in the final analysis, a showing of malice was essential to the action. Because the final ruling adopted a malice requirement, it implicitly rejected the claim that every denial of a right to vote would create a legally enforceable remedy. Contrary to the common misconception, the final ruling thus rejected a robust version of the *ubi jus* principle.

The ultimate irony of *Ashby v. White* is that while it is commonly cited as the source of a grand and powerful rule that for every right there must be a remedy, it actually demonstrates the inherent flimsiness of the *ubi jus* principle. By settling on a malice requirement, *Ashby* did one of two things:

97. K.N. LLEWELLYN, BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 94 (1960); *see also* Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 246 (1927) ("The distinction between . . . rights and remedies . . . is of use primarily as a basis on which to classify decisions after they have already been reached on other grounds."); Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593 (2008) (describing the modern "functional" approach to rights).

98. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999); *see also* James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 141 (1993–1994); David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 475 n.226 (2009–2010).

99. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87–88 (1999–2000); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1990–1991).

It either accepted that the *ubi jus* principle can be ignored when practical considerations so require, or it adopted a purely functional conception of rights that renders the *ubi jus* devoid of any content. Either way, *Ashby* shows that the *ubi jus* principle does not amount to much.